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In the

Supreme Court of the United States

No. 632

H. H. TUCKER, JR., and NELLIE M. TUCKER,
Appellants,

v.

J. MORGAN BAKER, *et al.*,
Appellees.

APPLICATION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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To the Honorable Supreme Court of the United States of America:

This is the petition of H. H. Tucker, Jr., and Nellie M. Tucker, for a writ of certiorari to the Circuit Court of Appeals for the Fifth Circuit, at New Orleans.

STATEMENT

This case was first decided by the United States District Court for the Northern District of Texas, Fort Worth Division, on the 5th day of February, 1948. An appeal was prosecuted by the appellants to the United States Circuit Court of Appeals, Fifth Circuit, and that Court reversed the decision of the United States District Court with instructions to enter a judgment not inconsistent with its decision.

The case was returned to the United States District Court with these instructions, but the Court did not observe the instructions embraced in the mandate of the Circuit Court of Appeals and again, on October 17, 1949, entered substantially the same judgment it had entered originally. From that judgment appeal was prosecuted to the Fifth Circuit Court of Appeals and that Court, without any additional testimony, reformed and affirmed the judgment of the District Court, which had originally been reversed and remanded with instructions.

JURISDICTION

The rules of this Honorable Court require the review of the decision of the Circuit Court of Appeals last rendered because three other Judges, to-wit, Holmes, Waller and Lee, had rendered the decision on the first appeal, which is in direct conflict with the decision from which we appealed, rendered by Hutcheson and Borah and dissented to by Judge McCord, which constitutes a decision by a Circuit Court of Appeals in conflict with a decision of another Circuit Court of Appeals on the same matter.

NATURE OF THE CASE

This was filed as a voluntary reorganization proceeding under Chapter 10, of the Bankruptcy Act as Amended, pp. 501-676.

The Trial Court, after hearing evidence, including admission by the alleged debtor, that the trust estate was not insolvent, found that the petition was filed in good faith and adjudicated it a bankrupt.

An appeal was prosecuted from this decision by the appellants and the Court of Appeals reversed the decision of the Trial Court and remanded the case for further proceeding not inconsistent with that Court's opinion, and found that the petition was not filed in good faith and that the evidence clearly established that it was not insolvent. *170 Fed. 2d 939.*

On a second hearing of the case by the Trial Court a judgment was entered on October 17, 1949 continuing the bankruptcy proceeding in force and continuing the stay orders previously entered by it, which the Court of Appeals had held should be set aside.

The appellants prosecuted a second appeal from this second judgment of the Trial Court, which was entered without any testimony whatsoever, and the Court of Appeals held that the stay orders which had been entered by the Trial Court were erroneous, but that the bankruptcy order was properly entered and might not be set aside. (Tr. 122.)

FIRST ASSIGNMENT OF ERROR

The Circuit Court of Appeals committed fundamental error in continuing the bankruptcy reorganization after three other judges of the same court had finally adjudicated the bankruptcy proceeding to have been filed in bad faith, and no additional evidence having been presented to sustain the proceeding.

SECOND ASSIGNMENT OF ERROR

The ruling in this case, Judge McCord dissenting, being in direct conflict with the decision by Judges Holmes, Waller and Lee, based on the same record and without any additional evidence whatsoever, requires that this Honorable Court pass upon and determine the issue of jurisdiction of the District Court to adjudicate the so-called debtor a bankrupt.

BRIEF OF THE CASE

In the original hearing of this case by the United States District Court, the District Court found, as it was compelled to do before it could adjudicate the Texas American Syndicate a bankrupt, that the Texas American Syndicate was insolvent. An appeal from the decision was taken to the Circuit Court of Appeals by Tucker, et al., as appellants, and was presented to Judges Holmes, Waller and Lee. A decision in the case was rendered on December 7, 1948 by the Circuit Court of Appeals, Circuit Judge Holmes wrote the opinion, which was unanimous. *170 Fed. 2d 939*. That Court held that the petition was not filed in good faith and should be set aside, and the case was reversed and remanded for further proceeding not inconsistent with that opinion.

When the case was sent back it was again argued before the Trial Court without any additional evidence of any nature being submitted. A petition for receivership

was filed by some of the parties. All of the allegations of the petition for a receiver were denied under oath by Defendant Tucker and no receiver was appointed, nor was any evidence pertaining to it introduced.

The Trial Court continued in effect and force the bankruptcy decree originally entered in the case. *185 Fed. 2d 863.*

On the second appeal the original decision of the Circuit Court of Appeals was set aside by two of the Judges sitting in the case, Judges Hutcheson and Borah, but, as stated in the application, Judge McCord dissented without writing any dissenting opinion. A dissent was likewise entered by Judge McCord on the motion for rehearing.

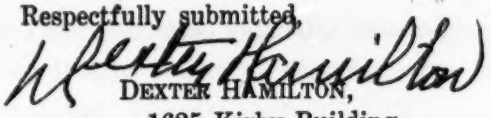
Thus, as appears from the record, four Judges of the Circuit Court of Appeals thought the Trial Court's judgment was erroneous and should be set aside, while only two members of the Appellate Court thought it ought to be modified and affirmed.

The action of the majority of the Judges of the Circuit Court of Appeals handing down the last decision of the Circuit Court of Appeals, has rendered a decision in conflict with the decision in the same case, on the same facts, on a former appeal.

We respectfully submit that the last opinion, written by Judge Hutcheson, cannot be correct if the former were correct.

WHEREFORE, we respectfully pray the Court that upon consideration of the record in this case this Honorable Court set aside the opinion of the Circuit Court of Appeals, dated December 26, 1950.

Respectfully submitted,



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A copy of this Application for Writ of Certiorari has been mailed to: Mr. J. Hart Willis, Dallas, Texas; Mr. J. B. Wade, Fort Worth, Texas; Mr. John B. Stigall, Dallas, Texas; Mr. Garth B. Melson, Indianapolis, Indiana; Mr. W. E. Allen, Fort Worth, Texas; Mr. Charles S. Hopkins, Olean, New York.

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CHARLES ELMORE CR

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 632

H. H. TUCKER, JR., AND NELLIE M. TUCKER,
Petitioners

vs.

J. MORGAN BAKER, ET AL,
Respondents

BRIEF FOR RESPONDENTS in OPPOSITION to PETITION for CERTIORARI

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The Opinion of the United States Court of Appeals, Fifth Circuit, is in 185, Fed. (2d) 863.

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